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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN GUTIERREZ,

Defendant and Appellant.

B149815

(Super. Ct. No. BA202688)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Curtis B. Rappe, Judge. Affirmed.

Sandra Uribe, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson,  
Supervising Deputy Attorney General, and Erika D. Jackson, Deputy Attorney General,  
for Plaintiff and Respondent.

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Adrian Gutierrez appeals the judgment entered after conviction by jury of second-degree murder committed for the benefit of a criminal street gang. (Pen. Code, §§ 187, 186.22, (b)(1).)<sup>1</sup> The trial court sentenced Gutierrez to a term of 18 years to life in state prison. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Prosecution's evidence.*

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on the evening of November 25, 1999, Thanksgiving Eve, Debra Luna went to Gina's Bar in the City of Commerce with her friend, Roseann Aguilar. During the evening, they went across the street to Nina's Bar. Numerous members of the Mongols motorcycle gang were present at Nina's Bar.<sup>2</sup> Gutierrez was one of the Mongols in the bar that evening. Gutierrez told Luna his name was "Panhead" and displayed a tattoo on his left arm of the word "pan" and a Mongol head in a frying pan.<sup>3</sup> Gutierrez asked Luna to purchase a raffle ticket to support

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code.

<sup>2</sup> Whether the Mongols are a motorcycle gang or a motorcycle club was in issue at trial in the context of the gang enhancement allegation. Apparently, Jesse "The Body" Ventura, the current governor of the State of Michigan, is a former member of the Mongols. Although Governor Ventura might dispute the jury's true finding on the gang enhancement allegation, we defer to the jury's finding and refer to the Mongols as a motorcycle gang.

<sup>3</sup> Luna did not examine the tattoo at the time because Gutierrez had a collage of tattoos on his arm. However, the tattoo was later photographed and shown to the jury. Gutierrez, who was "heavily" tattooed, also had "Mongols" and a diamond with "one percent" on his left wrist, the letters "MF," which stands for Mongols forever, on the

children and the homeless. Luna paid \$5 for the ticket and Gutierrez wrote his name and address on the back of the ticket. Shortly thereafter, Luna returned to Gina's Bar.

Several Mongols, including Gutierrez, also went across the street to Gina's Bar.

Gutierrez appeared to be the leader and the other individuals wearing Mongol jackets listened to him.

Jeremy McDonald, then a Mongol "prospect," testified under a grant of use immunity.<sup>4</sup> Gutierrez approached McDonald in Gina's Bar and asked for McDonald's buck knife.<sup>5</sup> There was no urgency in Gutierrez's request and there was no altercation in the bar at that time. After McDonald gave Gutierrez the knife, Gutierrez told McDonald to escort one of the Mongol officers to the bathroom and guard the door while the officer was in the bathroom.

At about the same time, Luna was seated near the front door. Daniel Herrera, Luna's common law husband and the father of her three children, came to the door of Gina's Bar. Herrera angrily asked why Luna had not answered her cellular telephone and why she was there with "all these fucking [Mongols]." Gutierrez and four of five other

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back of his neck, "Mongols M. C.," which refers to the Mongols Mother Chapter of which Gutierrez was a member, on the right side of his neck, and "Mongols" across his chest.

<sup>4</sup> McDonald pleaded guilty in federal court to charges of buying and selling stolen motorcycle parts, altering VIN's and two counts of interstate transportation of stolen motorcycles. He had not yet been sentenced in federal court. McDonald hoped his cooperation in this investigation would result in leniency in the federal case.

<sup>5</sup> Prospects acted as security guards at Mongol functions and were supposed to carry knives.

Mongols immediately ran to the door of the bar and attacked Herrera. The first person to approach Herrera was Gutierrez. Luna pleaded with the Mongols to desist but they continued to beat Herrera with their fists and feet. Herrera ran but the Mongols chased him down the street out of Luna's sight.

Aguilar observed the fight from the front of Nina's Bar and testified Gutierrez was one of the bikers who was hitting and kicking Herrera.

McDonald heard a thump while he was guarding the bathroom and, when McDonald returned to the bar, it was empty. McDonald saw a group of individuals wearing Mongol jackets about half a block down the street. The group walked away from a male on the ground. As the group walked back to the bar, the man got up and ran toward the sidewalk.

Luna testified the Mongols ran back to Gina's bar. Gutierrez was "all sweaty and perspiring . . . ." Gutierrez and another Mongol approached Luna and demanded the raffle ticket with Gutierrez's telephone number on it. Gutierrez and his associate threatened to "take care of" Luna if she did not comply. Luna returned the ticket and asked for the return of her \$5. Gutierrez gave Luna the money. Luna drove home but, when she found Herrera was not there, she returned to the scene.

At approximately 12:25 a.m., Sheriff's Deputy Scott Hennessey found a trail of blood that went from Washington Boulevard around the corner onto O'Neil Street and stopped at Herrera's body. Luna arrived shortly thereafter. Hennessey spoke to Luna

and observed her to be hysterical and stumbling. Hennessey opined Luna was drunk and very upset.

Approximately five hours later, Sheriff's Detective Michael Scott noticed the odor of alcohol about Luna during an interview but testified any difficulty Luna had communicating with Scott was due to the fact she was upset rather than intoxicated. Luna and Aguilar selected Gutierrez's picture from a photographic lineup and indicated he was one of the individuals in the bar on the night of this incident.

A deputy medical examiner testified Herrera died as the result of a stab wound to the torso with contributing conditions of blunt force trauma. The stab wound was consistent with a buck knife, which is sharp on only one side. Had Herrera only been stabbed, he might have survived the injury.

William Queen, a special agent for the Bureau of Alcohol, Tobacco and Firearms (ATF), infiltrated the San Fernando Chapter of the Mongols in an undercover operation that lasted from March 1998 until May of 2000. Queen became the secretary/treasurer of the chapter and, in this capacity, received a copy of the Mongol constitution. Queen testified the goal of the Mongols was to be the "top dog outlaw motorcycle club in the country, the baddest club on bikes out there." Outlaw motorcycle gangs, such as the Hell's Angels and the Mongols, refer to themselves as "one percenter[s]." This term is meant to separate these outlaw motorcycle gangs, who consider themselves to be above the law, from law-abiding motorcycle organizations. The Mongols committed crimes to

establish their reputation including narcotics trafficking, gun violations, extortion, assaults, witness intimidation, theft and other crimes.

The day after Herrera's death, the Mongols issued a "code 55," which meant members were not to wear their Mongol jackets when riding their motorcycles. The purpose of the Code 55 was to protect one of the Mongols from arrest. That same day, McDonald, who was a member of the San Fernando Chapter of the Mongols, told Queen that Gutierrez asked McDonald for his knife right before the altercation at the bar. Queen saw Gutierrez approximately two weeks after Herrera's death and noticed his appearance had changed significantly in that Gutierrez no longer had any facial hair. About a month and a half later, Gutierrez had a new skull and crossbones patch on his Mongol jacket. The Mongol constitution indicated a skull and crossbones patch would be awarded to members who provide outstanding service to the club. However, Queen learned the skull and crossbones patch was given to an individual who killed for the club. During a search of Gutierrez's home, his motorcycle was found to have a skull and crossbones on the taillight.

In surreptitiously tape recorded conversations with Gutierrez on December 21, 1999 and January 6, 2000, Queen tried to get Gutierrez to confess to the murder of Herrera by complimenting Gutierrez on how he had "upped . . . the image of the Mongols two whole fucking notches . . . ." Queen indicated he wanted Gutierrez with him if there was trouble. In the course of one of these conversations, Gutierrez said they should not be speaking about the incident, "we never did nothing," and "I was home making . . .

turkey and pie with one of my mother-in-laws. That's where I was . . . with my old lady that night." However, Queen testified Gutierrez's tone of voice during this conversation did not sound like a denial.

ATF Special Agent John Ciccone was responsible for protecting Queen, directing the investigation and maintaining contact between Queen and ATF during Queen's undercover work. Ciccone testified as a gang expert that violent crime is one of the Mongols primary reasons for acting as a gang. A member of the Mongols who exhibited a skull and crossbones patch without having earned the patch would be kicked out of the club, assaulted or have his motorcycle taken.

Queen and Ciccone testified about the predicate offenses necessary to prove the People's allegation the Mongols were a criminal street gang within the meaning of section 186.22, subdivision (e).<sup>6</sup>

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<sup>6</sup> In connection with this allegation, Queen testified he witnessed three of four assaults by Mongols. On one occasion, Queen pulled the assault victim from the bar in which the assault was taking place so the individual, who had been kicked in the head and was bleeding, could escape. Later that same evening, Queen was attacked by an individual with a knife who repeatedly tried to stab Queen. Queen yelled at the Mongol sergeant at arms to shoot the individual. The sergeant at arms told the individual to cease the attack and the individual complied. The sergeant at arms and another Mongol took the individual's knife and said the knife would be returned the following Thursday at a bar the Mongols frequented. The sergeant at arms gave Queen the knife and indicated Queen should stab the individual when the individual came to get it.

Queen witnessed the intimidation of an assault victim who had reported a Mongol attack to the police. The individual was told that if he testified against a Mongol he would be killed. The individual thereafter testified but claimed no recollection of the incident.

*2. Defense evidence.*

Lino Luna, one of the founders of the Mongols and the present secretary/treasurer of the national chapter, testified he has never been arrested or convicted of any crime, the Mongols cannot control the personal criminal activities of individual members, and the skull and crossbones patch is not awarded to members who kill for the club. Lino Luna admitted, on cross-examination, that the Mongol constitution does not mention the various types of wing patches that are awarded for certain sexual acts.

*3. Sentencing considerations.*

The jury found Gutierrez guilty of second-degree murder but found the personal use of a dangerous or deadly weapon allegation under section 12022, subdivision (b)(1), not true.

## **CONTENTIONS**

Gutierrez contends his murder conviction cannot be based on aiding and abetting a breach of the peace and the trial court improperly limited cross-examination of Queen.

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On another occasion, members of the Mongols went to the home of a former member, took his motorcycle and tools and told him if the matter were reported to the police, he and his wife would be killed.

Ciccione testified a member of the Mongols had been convicted of assault by means of force likely to produce great bodily injury in 1996 and another member had been convicted of shooting at an inhabited dwelling in 1990.



## DISCUSSION

### 1. *The breach of the peace alleged in this case was not trivial activity.*

The People prosecuted Gutierrez on alternate theories of liability. They asserted the evidence showed Gutierrez personally stabbed Herrera or, alternatively, that Gutierrez aided and abetted an assault or a breach of the peace, the natural and probable consequence of which was murder. Gutierrez notes the jury found the personal use of a deadly weapon allegation not true. Therefore, it necessarily convicted him on the aider and abettor theory. Gutierrez contends a “trivial” activity, such as breach of the peace, cannot act as the target offense in a murder prosecution on a theory of aider and abettor liability because murder is not reasonably foreseeable consequence of a breach of the peace. (*People v. Prettyman* (1996) 14 Cal.4th 248, 269.) Gutierrez argues that because his conviction of second-degree murder may have been based on the inappropriate theory, the conviction must be reversed. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

We disagree. “A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 260-262.)” *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133; *People v. Gonzalez* (2001) 87 Cal.App.4th 1, 8.) “Murder, for instance, is *not* the ‘natural and probable consequence’ of ‘trivial’ activities. To trigger application of the ‘natural and

probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269.)

Here, the evidence showed a breach of the peace that was not trivial. That is, it reasonably may be foreseen that when five members of the Mongols motorcycle gang set upon an unarmed individual and chase the individual down the street, beating and kicking him, that a fatal injury might result either by reason of the beating itself or the use of a deadly weapon during the attack.

Gutierrez concedes *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054-1056, upheld a murder conviction in a case in which one of the target offenses was breach of the peace. Gutierrez attempts to distinguish *Montes* because it involved a clash between two rival gangs whereas, in this case, there was no pre-existing animosity between himself and Herrera and there was no evidence Mongols normally commit murder to further the gang's objectives. Gutierrez argues the evidence regarding whether Mongols normally are armed was contradictory in that McDonald became a full member of the Mongols even though he refused to purchase a gun, Gutierrez did not carry a weapon on the night of this incident and Queen once asked a Mongol to shoot a knife-wielding assailant but the Mongol merely disarmed the attacker. Thus, murder was not a reasonably predictable outcome of a breach of the peace involving the Mongols.

Gutierrez's evaluation of the evidence overlooks McDonald's testimony that Mongol prospects were required to carry a knife and that McDonald gave Gutierrez a

buck knife shortly before Herrera was stabbed. Although there was no testimony that indicated murder was commonplace among the Mongols, the evidence of the numerous assaults and deadly threats reveals that fatal consequences were reasonably to be anticipated when a group of Mongols attacked an unarmed citizen. Thus, as in *Montes*, the target offense of breach of the peace was not trivial. Accordingly, no legal insufficiency appears in the People's aider and abettor theory of liability.

2. *Confrontation clause.*

Gutierrez contends the trial court improperly curtailed cross-examination of Queen with respect to his participation in a televised interview that disclosed the details of Queen's undercover activities. Gutierrez contends the exclusion of this evidence was erroneous because Queen's bias, prejudice, motive and propensity for telling the truth were relevant. Thus, Gutierrez asserts he should have been permitted to ask whether Queen followed ATF protocol when he agreed to the interview and whether Queen had a personal interest in not following the rules. The evidence would not have consumed an undue amount of time and exposure of a witness's motivation for testifying to discredit the witness is a traditional function of cross-examination. (*Olden v. Kentucky* (1988) 488 U.S. 227, 231 [102 L.Ed.2d. 513]) Gutierrez notes Queen was the prosecution's central witness with respect to the gang enhancement allegation and the People relied on Queen's testimony to establish the Mongol practice of carrying weapons and committing assaults, which formed the basis of the aider and abettor theory of liability. Because Queen was a crucial witness, Gutierrez asserts the denial of the right to cross-examine

was not harmless. (*Olden v. Kentucky, supra*, at p. 233.) Gutierrez further asserts the conviction must be reversed under state law because there is a reasonable probability the jury would not have convicted him had it learned Queen was willing to lie and bend ATF rules for his own financial gain. (*People v. Stewart* (1983) 145 Cal.App.3d 967, 977; *People v. Allen* (1978) 77 Cal.App.3d 924, 939.)

“ ‘[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, “to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.” ’ [Citations.] However, . . . [w]ithin the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.” (*People v. Frye* (1998) 18 Cal.4th 894, 946; *People v. Hillhouse* (2002) 27 Cal.4th 469, 494; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

Here, the trial court permitted defense counsel to cross-examine Queen extensively and specifically permitted cross-examination with respect to whether Queen had negotiated any book or movie deals based on his undercover experience. Queen

admitted he had been advised his experience made an incredible story and that some interest had been shown in the rights to the story but that he was not currently a party to any such deal. Gutierrez asserts this cross-examination was not an acceptable substitute for cross-examination regarding Queen's willingness to violate ATF rules. However, the cross-examination permitted by the trial court did expose Queen's possible personal interest in the outcome of this case. Thus, the excluded cross-examination would not have given the jury a significantly different impression of Queen's credibility.

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674].) Accordingly, Gutierrez cannot show a reasonable probability of a more favorable outcome absent the claimed error.

Gutierrez claims the evidence of guilt was not strong because the jury deliberated for three and a half days before reaching a verdict, requested a read back of the testimony related to the gang enhancement and requested instruction on how to proceed vis-à-vis the greater and lesser offenses. Gutierrez argues all these factors suggest the jury had reservations about the case. However, some of the time in deliberation obviously was consumed by the jury's consideration of the first degree murder charge, which the People withdrew during deliberations. Further, the requested read back of testimony, as well as the not true finding on the personal use of a dangerous or deadly weapon enhancement, suggests the jury conscientiously approached its task and gave Gutierrez the benefit of every reasonable doubt, not that the evidence of guilt was weak.

In sum, we conclude there is no reasonable probability of a result more favorable to Gutierrez had defense counsel cross-examined Queen about possible violations of ATF regulations in connection with the television interview. Accordingly, any error must be seen as harmless.

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.